IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CONTEMPT PETITION NO. 67 OF 2007

IN

CIVIL APPLICATION NO 5879 OF 1997

IN

WRIT PETITION NO. 3614 OF 1990

1.Ayesha Begum Sujaiuddin and Ors. ..Petitioners.

Versus

1. Kazi Rajiyuddin Jahiruddin

(since deceased through L.R.'s) ..Respondents.

A.N.Mulla for the petitioners.

Mr.G.S.Godbole for respondent nos.1(a) to 1(b) and 2 and 3.

CORAM: S.C.DHARMADHIKARI, J

7th December, 2007.

O R D E R :

1. On 7.12.2007 I had passed the following order:-

". For the reasons to be separately recorded, petition is dismissed.

2. The reasons for the dismissal of the Contempt Petition are set out herein below.

3. Heard Mr.Mulla appearing for the petitioners and Mr.Godbole, appearing for Respondent nos.1(a) to 1(c), 2 and 3. This Contempt Petition alleges that the respondent nos.1 to 3 have deliberately and willfully committed breach of an Undertaking given to this court on 25.9.1997 in Civil Application No. 5879 of 1997 in Writ Petition No. 3614 of 1990.

4. Mr.Mulla submits that Respondent nos.1 to 3 preferred a Writ Petition being Writ Petition No. 3614 of 1990 in this court against the judgment and decree passed by the Civil Judge, Senior Division, Nasik in Darkhast No. 57 of 1959.

5. It is urged that the suit was filed for administration of properties being Special Civil

Suit No. 40 of 1955.

6. This suit was filed by the ancestors of the present petitioner and Respondent nos.1 to 3. It was decreed and share of respective heirs was determined. The Regular Darkhast was filed and that was also decided on 5.4.1990.

7. This court granted interim relief in terms of prayer clause (c) of the above Writ Petition on 7.8.1990 and the subject proceedings were stayed to the extent of Survey No. 806/2B and 806/4. It is submitted that the suit property was not divided by metes and bounds. The partition was yet to be effected. Still, the respondents wrongfully purported to transfer a part of the suit premises by executing an Agreement for sale. The respondents were fully aware that this court had stayed the proceedings and the ad-interim order was in force. Therefore, the petitioners preferred C.A.No.5879 of 1997 preventing alienation or third party rights being created. In the Civil Application, this court passed the following order on 25.9.1997:-

> ". The Ld.Counsel for the Respondent no.1 to 3 states that, the Respondent no.1 to 3 shall not part with possession or create any third party interest during pendency of the Writ Petition. Statement is accepted. Disposed of.

8. The petitioners thereafter alleged that the writ Petition was listed for hearing and final disposal and this court was pleased to dismiss the Writ Petition filed by Respondent nos.1 to 3. This court was pleased to hold that the respondent/original petitioners did not approach this court with clean hands. They have suppressed vital materials and facts. The Writ Petition was therefore dismissed. My attention is invited to the order dated 6.11.1997 in the above writ petition.

9. The respondents who are original petitioners challenged this judgment by filing Special Leave Petition NO. 793/32 of 1998 in the Supreme court of India. The Supreme Court of India initially passed an interim order staying the execution proceedings. Subsequently, the SLP was converted into Regular

Civil Appeal bearing No. 2904 and 2905 of 2001. After hearing the parties, the Supreme Court of India was pleased to allow the Appeal and remanded the matter back to this court for fresh hearing.

10. Subsequently, that Writ Petition has been placed before a Learned Single Judge of this Court and the Learned Single Judge has admitted the Writ Petition. A request was made to this court to restore the interim order passed earlier. However, the court passed an order that the lower court can proceed with the matter and pass a final decree but the final decree will not be given effect, till Writ Petition NO. 3614 of 1990 is disposed off.

11. In the meanwhile, it is alleged that the respondents have from the very beginning taken advantage of the poverty and illiteracy of the parties. The subject lands have not come to their share, yet the Respondent nos.1 to 3 have contrary to the Undertaking given to this court on 25.9.1997, executed a registered General Power of Attorney on 17.11.2006 in favour of Respondent no.4. Therefore,

by executing such power of Attorney the Respondent nos.1 to 3 have acted in violation of their Undertaking to this court that they will not part with possession and create any third party interest in respect of the above lands. By appointing Respondent no.4 as their General power of Attorney for the purpose of selling and transferring the suit land during pendency of this Writ Petition, the Respondent nos.1 to 3 have acted in contravention and breach of the Undertaking given to this court. Respondent nos.1 to 3 were fully aware that there is a stay to the execution proceedings. In such circumstances, this court must take appropriate action in accordance with law.

12. On this Contempt Petition, this court has issued Show Cause Notice on March 6, 2007 and made it returnable on 20.4.2007. Mr.Godbole entered his appearance and sought time to file reply. There is a reply-affidavit filed by the respondents. They have in their reply-affidavit pointed out that the contempt petition is not maintainable. Even the contempt petitioner has suppressed the material

facts, inasmuch as, the petitioner no.2 in the Contempt Petition has expired on 29.1.2000. The petitioners have filed the Contempt petition by suppressing the fact that they cannot be constituted attorney of the deceased Kamaruddin Akbarsaheb Kazi. Further petitioner no.4 Jilani Akbar Kokani is not a party to the Writ Petition No. 3614 of 1990 either in his individual capacity or in the capacity as Constituted Attorney though he may have appeared in the Writ Petition on behalf of some of the respondents claiming to be their constituted attorneys. He cannot therefore file a Contempt Petition. Thirdly, the petitioner no.3 had already terminated the power of attorney in favour of petitioner no.4 and a public notice was issued on that behalf on 24.10.2006. Lastly, it is urged that the petitioner no.1 had sent a notice dated 17.4.2007 through her advocate stating that the Contempt Petition has been filed without obtaining her consent and concurrence. Contempt Petition is not in the interest of the petitioners.

13. Apart from the above preliminary objections,

it is contended that there is no contempt as alleged of the Undertaking given to this court. The statement made to this court was that Respondent nos.1 to 3 will not part with possession or create any third party rights or interest. The members of the Quazi family, some of whom were parties to the Writ Petition and some were not, have signed and executed a Registered partition deed dated 5.3.2007. The petitioners to this contempt petition have not set out and suppressed the background in which the power of attorney was executed. The power of attorney has been executed after it was agreed between the Kazi family members that the property would be partitioned. The power of attorney which was executed does not at all create any third party rights or interest in the property. Apart from this, petitioner no.4 cannot file and prosecute the Contempt Petition inasmuch as Ayesha Begum Sujauddin Kazi, petitioner no.1, petitioner no.3 Muzibuddin Khairuddin Kazi and heirs and legal representatives of deceased petitioner no.2 have executed an identical Power of Attorney dated 30.9.2006 in favour of Bhaskar Laxman Tambe. Copies of power of

attorneys have been annexed, further, other respondents have adopted the statements in these affidavits. In the affidavit filed on 17.10.2007 on behalf of Respondent no.1(c) the following is stated :-

> "3. I say that after filing of the Contempt Petition, one Jilani Akbar Kokani i.e. Petitioner no.4 has entered into an MOU with Shri Pandharinath Nere on 2.8.2007 and has agreed to unconditionally withdraw the Contempt Petition No.67 of 2007. Thereafter, said Shri Jilani Akbar Kokani has received various amounts from Shri Pandharinath Nere and has executed various receipts dated 24.2077, 28.9.2007 and 8.10.2007. Copies of the said MOU dated 2.8.2007 and receipts are annexed hereto and marked as Exhibit-A colly. I say that the copies of aforesaid documents were given by Shri Pandharinath Nere to me.

14. There is a counter Affidavit filed in reply to this Affidavit by petitioner no.4 on 26.11.2007. There is a further affidavit which is tendered on 6.12.2007.

15. I have perused the petition and the annexures thereto including the orders passed by this court and the Hon’ble Supreme Court. I have also perused

the affidavits filed in the court. Mr.Mulla places reliance upon a decision of the Hon'ble Supreme Court reported in AIR 1990 S.C. page 464 Noorali Babul Thanewala vs. K.M.M.Shetty in support of his submission that breach of an Undertaking given to a court tantamounts to a breach of injunction and therefore it would involve same consequences on the persons violating that undertaking as would their disobedience to an order of injunction. In other words, according to him the same is civil contempt. He has invited my attention to other judgments in the field on the point that this would constitute a civil contempt.

16. Upon repeatedly questioning Mr.Mulla as to how mere execution of a General Power of Attorney amounts to transfer or creating third party interest in the property/land being Survey No. 806/2-B and 806/4, beyond stating that it was an attempt to do so, Mr.Mulla could not point out anything. It is true that the power of attorney refers to these lands. However, it is stated that these lands belong to the members. A proper perusal of this

would show that the power of attorney refers to the disputes between the Kazi family and their desire to put an end to the same amicably. All such disputes having been decided to be resolved amicably, appropriate documents and agreements have been exchanged. However, it is not possible for the family members to remain present in the office of the Sub-Registrar on every occasion. In such circumstances having decided to appoint attorney and that is how the General power of Attorney in favour of respondent no.4 proceeds. To my mind, respondent no.1 to 3 have not parted with possession or created any third party interest in respect of the lands in favour of respondent no.4 by executing the power of attorney. The very statements in the Contempt Petition proceed on the basis that the respondents purported to transfer part of the land. The allegation is not that the respondents have parted with possession or created any third party interest in respect of the lands in question. The petitioners are fully aware that there is no attempt to alienate or part with the lands nor their petition proceeded on the basis that the lands have

been parted with or third party rights created in respect thereof. A perusal of the para-8 and 9 of the petition, makes it abundantly clear that the petitioners are aware of the background in which the General Power of Attorney has been executed.

17. I am unable to accept the argument of Mr.Mulla that the Undertaking given to this court has been breached or violated. I am in agreement with Mr.Godbole that the intentions of the petitioner no.4 are not bonafide. Apart from the fact that the preliminary objections also have substance, I am in agreement with Mr.Godbole on the other aspects as well. I am satisfied from a perusal of the Contempt Petition that the same does not make out a case of civil contempt. The nature of the allegations being such, that it is not possible to conclude that Respondent nos.1 to 3 have violated the Undertaking or disobeyed the same in any manner. The contempt petition is not a remedy to settle scores and private disputes. Contempt is a matter between the court and parties like respondent nos.1 to 3. The petitioners have made allegations in the petition

which read as a whole do not make out a case of civil contempt.

18. In such circumstances, there is no merit in this petition and it stands accordingly dismissed.

sd/-